Supreme Court, U.S.
FILED

97-228 AUG 5 1997

No. _____

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

GAMMA-10 PLASTICS, INC.,

Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD.,
and AMERICAN PRESIDENT COMPANIES, LTD.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD T. THOMSON
Counsel of Record
LAPP, LAURIE, LIBRA, ABRAMSON AND THOMSON, CHARTERED
One Financial Plaza
Suite 1800
120 South 6th Street
Minneapolis, MN 55402
(612) 338-5815

STANTON T. ROSEN
310 Parkdale Plaza
1660 South Highway 100
St. Louis Park, MN 55416
(612) 417-0660

Attorneys for Petitioner Gamma-10 Plastics, Inc.

RECEIVED
AUG 05 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

43 pp

QUESTIONS PRESENTED

In maritime law, the *Tan Hi* doctrine provides that if a carrier charged with delivering goods to a consignee at a foreign port delivers them into the custody of foreign government agents in accordance with the law or custom of the foreign port, the carrier is deemed to have made "proper delivery" and is relieved of responsibility for subsequent damage to the goods. *See Tan Hi v. United States*, 94 F. Supp. 432 (N.D. Cal. 1950).

The questions presented by the present case are:

1. Whether the *Tan Hi* doctrine may be invoked to insulate a carrier from liability for subsequent damage to goods delivered into the custody of government agents in accordance with the law of the foreign port, when the damage is caused by the carrier's own mishandling of the goods prior to their delivery into the custody of the local government agents.

2. Whether the *Tan Hi* doctrine may be invoked to insulate a carrier from liability for subsequent damage to goods delivered into the custody of government agents in accordance with the law of the foreign port, when the carrier retains control (but not custody) over the goods at all times.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case.

American President Companies, Ltd. is the parent corporation of American President Lines, Ltd., a wholly owned subsidiary. American President Companies, Ltd. has an interest in the following subsidiaries and affiliates:

- American Consolidation Services, Ltd.
- American President Trucking Company, Ltd.
- APL Information Services, Ltd.
- APL Land Transport Services, Inc.
- Eagle Marine Services, Ltd.
- Natomas Real Estate Company

TABLE OF CONTENTS

PAGE

Questions Presented..... i

List of Parties..... ii

Table of Contents..... iii

Table of Authorities..... v

Opinions Below..... 1

Basis for Jurisdiction..... 1

Constitutional Provisions and Statutes Involved..... 2

Statement of the Case..... 3

Reasons for Granting the Writ..... 9

I. The United States Court Of Appeals For The Eighth Circuit Has Entered A Decision In Conflict With The Decisions Of The United United States Courts Of Appeals For The Fifth And Ninth Circuits On The Same Important Matter..... 9

II. The United States Court Of Appeals For The Eighth Circuit Has Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court 13

Conclusion..... 14

INDEX TO APPENDIX

PAGE

Decision of the Eighth Circuit Court of Appeals A1

Order of the Eighth Circuit Court of Appeals Denying Petition for Rehearing A12

Order of the District Court for the District of Minnesota denying Petitioner's Motion for New Trial A13

Judgment of the District Court for the District of Minnesota A18

District Court's Jury Instruction No. 21 ..... A19

District Court's Jury Instruction No. 21(a) A20

District Court's Jury Instruction No. 22 ..... A21

District Court's Jury Instruction No. 27 ..... A22

TABLE OF AUTHORITIES

Cases:	PAGE
Allstate Ins. Co. v. Imparca Lines, 646 F.2d 166 (5th Cir. 1981)	11
Atlantic Mutual Ins. Cos. v. M/V "Balsa 38," 695 F. Supp. 165 (S.D.N.Y. 1988)	13
Constable v. National S.S. Co., 154 U.S. 51 (1894)	10
Farrell Lines, Inc. v. Highlands Ins. Co., *696 F.2d 28 (2d. Cir. 1982)*	11
F.J. Walker Ltd. v. M/V Lemoncore, 561 F.2d 1138 (5th Cir. 1977)	10
Isthmian Steamship Co. v. California Spray-Chemical Corp., 300 F.2d 41 (9th Cir. 1962)	11
Orient Atlantic Parco, Inc. v. Maersk Lines, 740 F. Supp. 1002 (S.D.N.Y. 1990)	9
Pan-Am Trade & Credit Corp. v. The Campfire, 156 F.2d 603 (2d Cir. 1946)	11
Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297 (1959)	11
Sumitomo Corp. of America v. M/V Pennsylvania Rainbow, 1989 AMC 1467 (N.D. Cal. 1989)	13
Tan Hi v. United States, 94 F. Supp. 432 (N.D. Cal. 1950)	4-8, 10-11

PAGE

Statutes:

46 U.S.C. § 190..... 2, 9, 11, 13

46 U.S.C. § 1303(2)..... 2, 9, 13, 13

46 U.S.C. §§ 1300-1315..... 11

Secondary Sources:

Judith Meyer, *In Another Country: The Effect Of Mandatory Port Law Upon Statutory Duties Of Discharge And Delivery -- Tapco Nigeria v. M/V Westwind*, 9 Mar. Law. 123 (1984)..... 11,12

Thomas J. Schoenbaum, *Admiralty and Maritime Law* (2d ed. 1994)..... 9, 11, 13

James A. Ward, *The Floundering of "Delivery" Under Section 3(6) of COGSA: A Proposal To Steady Its Meaning In Light Of Its Legislative History*, 24 J. Mar. L. & Com. 287 (1993)..... 9

U.S. Department of Commerce, *U.S. Foreign Trade Highlights 1995* (Aug. 1996)..... 13

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, filed January 22, 1997, affirming the judgment of the district court is reported at 105 F.3d 387 (8th Cir. 1997), and is reprinted in the Appendix, *infra*, at A1 - A11. The decision of the court of appeals, filed March 10, 1997, denying the petition for rehearing, is unreported and is reprinted in the Appendix at A12. The district court's Order and Memorandum Opinion filed August 14, 1995, denying Petitioner's motion for a new trial, is unreported and is reprinted in the Appendix at A13 - A17. The district court's Judgment filed June 8, 1995, reprinted in the Appendix at A18, is unreported.

BASIS FOR JURISDICTION

The court of appeals entered its order on January 22, 1997. The order of the court of appeals denying the petition for rehearing was entered on March 10, 1997. An application for extension of time within which to file a petition for a writ of certiorari was filed on or about May 27, 1997. On June 3, 1997 Justice Thomas extended the time for filing a petition for a writ of certiorari to and including August 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Harter Act, 46 U.S.C. § 190:

> It shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. ...

The Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1303 (2):

> The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

STATEMENT OF THE CASE

This case arises out of a contract for carriage by sea between Petitioner Gamma-10 Plastics, Inc. (hereinafter referred to as "Gamma-10"), as shipper, and Respondents American President Lines, Ltd. and American President Companies, Ltd. (hereinafter jointly referred to as "APL"), as carrier. APL was to transport Gamma-10's ultra-pure plastic resin from the United States and deliver it to the consignee in The Peoples' Republic of China. The plastic resin was to be shipped in sealed containers to Shanghai, China, by way of Hong Kong, in September/October 1988.

APL accepted Gamma-10's cargo and issued "through", "CY to CY" bills of lading. A "through" bill of lading means that the carrier (here, APL) remains responsible for the cargo from the time the carrier accepts the cargo until the time the consignee takes it at the designated foreign port. "CY to CY" stands for "container yard to container yard." In a CY to CY shipment, the shipper (in this case Gamma-10) puts the goods on pallets in containers provided by the carrier (APL). The container doors are sealed and locked shut by the shipper. The containers are to be transported by the carrier in their sealed condition to the designated port. The cargo is to be delivered in the sealed containers to the consignee. In a container yard to container yard shipment, the containers must stay sealed until the consignee allows the seal to be broken.

In the present case, the Shanghai-bound containers were, upon their arrival in Hong Kong, to be placed by APL on a feeder vessel to carry them to Shanghai. Because the shipment was a "CY to CY" shipment on a through bill of lading, APL was responsible for proper delivery of Gamma-10's cargo in Shanghai in the sealed containers.

APL's own reports for the containers confirm one of Gamma-10's theories of liability; namely, that APL broke the seals and emptied, or "devanned," the sealed containers prior to the

arrival of the shipment in Shanghai, where APL delivered the devanned plastic resin to the local port authority. APL's records indicate that some of the sealed containers were devanned at APL's warehouse in Hong Kong. APL devanned the other sealed containers either at APL's warehouse in Hong Kong, or at some other time either before loading in the United States or after discharge in Hong Kong.[1]

APL's reports and testimony also confirm another of Gamma-10's theories of liability; namely that although the Shanghai port authority received custody of the goods, APL retained control over the goods at all material times.

The devanning caused the subsequent contamination of the entire shipment in Shanghai before the consignee accepted delivery. The consignee therefore rejected the shipment. The resulting financial loss and consequential damages to Gamma-10 forced Gamma-10 out of business.

Gamma-10 filed suit in Minnesota state court against APL, alleging negligence, breach of contract, and misrepresentation. APL removed the case to federal district court pursuant to 28 U.S.C. § 1441, basing the removal upon the district court's original jurisdiction under 28 U.S.C. § 1332.

In the ultimate trial of the case, APL defended in part on the basis of the *Tan Hi* doctrine, which provides a defense for carriers when cargo becomes worthless or lost after delivery into the custody of foreign government agents, if such delivery was in accordance with the law or custom of the foreign port. *See Tan Hi v. United States*, 94 F. Supp. 432 (N.D. Cal. 1950). In its

---

[1]Gamma-10 introduced evidence at trial from APL's employees that APL would make more money by devanning the goods as quickly as possible and re-using the containers on return shipments from the Orient, or on other shipments from the United States.

instructions to the jury concerning the application of the *Tan Hi* doctrine, the trial court in essence instructed that the jury must find for APL if APL delivered the cargo into the custody of the governmental agents (named either Sinotrans or PENAVICO) of the Shanghai port, regardless of whether APL had previously removed the cargo from the containers, and regardless of whether APL retained control over the cargo after its delivery into the custody of the governmental agents:

> The bills of lading in this case were through bills requiring delivery to a party in possession of an original bill of lading, the consignee. Therefore, in this case the duty of proper delivery required American President Lines either to deliver the cargo to the consignee or to deliver it to a fit wharf and to take reasonable steps to safeguard it until the shipper or the consignee had a reasonable opportunity to claim the cargo. But if you find that APL proved by the greater weight of the evidence that (1) the Chinese port practices, customs, regulations, or laws required American President Lines to relinquish the cargo to a port authority; (2) APL in fact delivered Gamma-10's goods into the custody of the port authority; (3) APL acted at all times in compliance with the port law and port regulations of the foreign port; and (4) the loss or damage was accomplished while the goods were in the custody of foreign port authority officials, then American President Lines is not liable for any damage or loss that occurred after the port authority took possession.
>
> I instruct you that proper delivery was also made if you find that (1) Sinotrans and PENAVICO are government-controlled agencies acting in an official capacity and outside of the agency or control of APL; (2) APL was required by law or port practices to relinquish the cargo to either agency; (3) APL delivered the cargo into the custody and control of either agency; (4) APL and its agents acted at all times in compliance with port law and port regulations of the foreign port; and (5) the loss or

> damage was accomplished while the goods were in the custody of either Sinotrans or PENAVICO.

Jury Instructions 21 and 21(a), included in the Appendix at A19 - A20.

Thus the *Tan Hi* instruction told the jury that APL had fulfilled its duty to Gamma-10 if APL merely delivered the cargo to the foreign port authority, without regard to whether the cargo was delivered in accordance with the requirement that the cargo be sealed and containerized. The *Tan Hi* instruction also permitted exoneration of APL based upon APL's delivery of custody of the cargo to the foreign port authority, without regard to whether APL relinquished control of the cargo.

Custody of the cargo unquestionably having been delivered to the foreign port authority, and the damage having occurred thereafter through contamination of the uncontainerized plastic resin in Shanghai, the jury found for APL. Gamma-10 moved for a new trial based in part on the *Tan Hi* jury instruction. The trial court denied the motion.

On appeal to the Eighth Circuit, Gamma-10 argued that the trial court's *Tan Hi* jury instruction improperly required the jury to find that APL had fulfilled its duty to Gamma-10 if the damage to the cargo **occurred** after its delivery to the Chinese government agents (which point was uncontested), whether or not the damage was **caused** by APL's prior mistreatment of the cargo. Gamma-10 also argued that the *Tan Hi* instruction erroneously told the jury that APL's delivery of the cargo to the governmental agents exonerated APL from any subsequent loss or damage, regardless of whether APL continued to retain control of the cargo.

The Eighth Circuit affirmed the trial court. The Eighth Circuit's affirmance necessarily means that a carrier is insulated from liability for damage to cargo if the damage **occurs** after a required delivery to foreign government agents, even though the damage was **caused** by the carrier's pre-delivery negligence and

breach of contract. Thus the court of appeals held that the contested jury instructions were acceptable because they allowed liability if the jury found that the damage **occurred before** delivery to the Chinese government agents, despite Gamma-10's argument that even if the damage occurred **after** delivery, APL should be liable because the damage was **caused** by APL's pre-delivery negligence and breach of contract.

The Eighth Circuit's affirmance also means that the *Tan Hi* doctrine applies to relieve carriers of liability for damage to goods even if the carriers, in delivering custody of the goods to foreign port authorities, retain **control** over the goods.

The Eighth Circuit found it significant that the jury instruction stated that APL had a duty to safeguard the cargo. The court of appeals was unpersuaded by Gamma-10's observation that although the jury was instructed that APL had a duty to safeguard the cargo, the same jury instruction told the jury that, whether or not APL safeguarded the cargo, APL could not be liable if the jury found that Chinese law required APL to relinquish the cargo to a port authority, that APL did so, that APL acted in compliance with Chinese law, and that the damage occurred while the goods were in the custody of foreign port authority officials. Because these facts were uncontested for purposes of the theory of liability in question, Gamma-10 argued unsuccessfully to the Eighth Circuit that essentially the trial court erroneously instructed the jury that APL's duty to safeguard the cargo was irrelevant in the circumstances present in this case; namely, where the carrier has given custody (not control) of the goods to a foreign port authority.

The Eighth Circuit further found significant the trial court's instructions to the jury that APL would be liable if Gamma-10 proved not only its contention that APL had failed to take reasonable steps to safeguard the cargo by emptying the cargo from the sealed containers (Instruction No. 22, included in the Appendix hereto at A21), but also that such failure was negligent (Instruction No. 27, included in the Appendix at A22). Again, the

Eighth Circuit was unpersuaded by Gamma-10's argument that the trial court's jury instructions erroneously precluded a finding of negligence. Gamma-10 pointed out that the trial court had improperly instructed the jury that APL did not have a duty to safeguard the cargo if APL met two conditions: (1) delivery of the cargo to the port authority in compliance with Chinese law; and, (2) subsequent occurrence (as opposed to causation) of the damage. Because the jury found that APL met both conditions, the jury could not have found that APL had a duty to safeguard the cargo. Therefore, under the principle that without a duty there cannot be negligence, Gamma-10 argued to the Eighth Circuit, unsuccessfully, that the *Tan Hi* jury instruction precluded a finding of negligence.

Finally, the Eighth Circuit found it significant that the trial court had instructed the jury that Gamma-10 contended that APL had violated Shanghai port law by devanning the cargo (Instruction No. 22), and that if Gamma-10 both proved its contention and proved that APL had been negligent in violating port law, APL would be liable (Instruction No. 27). Gamma-10's theories of liability, however, were not limited to contending that APL had violated port law by devanning the cargo, but, instead, included more importantly the theory that APL had violated the **bill of lading** by devanning the cargo in Hong Kong or elsewhere **before** coming into port at Shanghai.

The Eighth Circuit's decision, which broadly expanded the *Tan Hi* doctrine, precludes a jury from finding negligence or breach of contract where a carrier delivers goods into the custody of a foreign port authority (because, as a matter of law, the jury cannot find the existence of a duty) even where, as here, the carrier admits its own wrongdoing for both pre-discharge and post-discharge conduct.

Gamma-10 now asks this Court to grant certiorari to reverse the decision of the court of appeals.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH THE DECISIONS OF THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND NINTH CIRCUITS ON THE SAME IMPORTANT MATTER.

Federal maritime law provides that an ocean carrier has a duty to make proper delivery of the cargo. *See* 46 U.S.C. §§ 190; 1303(2). "[I]mproper delivery breaches a fundamental duty of the carrier for which there is liability." 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* (2d ed. 1994) (hereinafter, "*Schoenbaum*"), § 10-17 n. 1 (1994).

In situations where the carrier is not required to surrender control of the cargo to the foreign port authority, there is no uniform rule among the courts as to the meaning of proper delivery. *See* cases cited, and discussion, in *Schoenbaum*, § 10-17 n. 1.[2]

The lack of uniformity is more severe in situations where a carrier to a foreign port is forced by the law or custom of the port to deliver the cargo into the hands of the foreign port authority. In such situations, there is a well-settled doctrine,

---

[2]It has been suggested that the best definition of proper delivery in such situations is that "delivery requires that the consignee (or its agent) should have notice and a reasonable opportunity to inspect, remove the goods, and place them under proper care and custody." *Schoenbaum*, § 10-17 n. 1; *see also Orient Atlantic Parco, Inc. v. Maersk Lines*, 740 F. Supp. 1002 (S.D.N.Y. 1990); James A. Ward, *The Floundering of "Delivery" Under Section 3(6) of COGSA: A Proposal To Steady Its Meaning In Light Of Its Legislative History*, 24 J. Mar. L. & Com. 287 (1993).

known as the *Tan Hi* doctrine, that relieves a carrier from liability for the subsequent damage to the cargo if the law or usage of a foreign port charges the port authorities with the duty to receive cargo and distribute it to the consignees, and the carrier delivers the cargo to the foreign port authorities in conformity with such law or custom. *See Tan Hi v. United States*, 94 F. Supp. 432, 435-36 (N.D. Cal. 1950); *see also Constable v. National S.S. Co.*, 154 U.S. 51, 63 (1894) ("No rule is better settled than that the delivery must be according to the custom and usage of the port, and such delivery will discharge the carrier of his responsibility.").

The Circuits are in conflict concerning the scope and meaning of the *Tan Hi* doctrine. By its decision in the case at bar, the United States Court of Appeals for the Eighth Circuit interprets the *Tan Hi* doctrine to relieve a carrier from liability for the carrier's own mistreatment of cargo if the cargo is delivered into the hands of a foreign port authority in accordance with foreign law, and the damage caused by the carrier's mistreatment develops after delivery to the foreign port authority.

The Eighth Circuit also interprets the *Tan Hi* doctrine to exonerate a carrier from damage to cargo that occurs after custody of the cargo is transferred to a foreign port authority, even if the carrier retains control (but not custody) of the cargo.

The Eighth Circuit's interpretation of the *Tan Hi* doctrine is in direct conflict with the basic underpinnings of the doctrine as interpreted by the Fifth and Ninth Circuit Courts of Appeals. As interpreted by those other courts of appeals, the purpose of the *Tan Hi* doctrine is to relieve a carrier of liability where damage occurs because of the intervention of foreign authority over which the carrier has no control. Where damage to cargo occurs because a foreign authority interposes its control over the cargo, it is obviously unfair to impose liability upon a carrier that had no ability to prevent the damage. But where the damage occurs because of the carrier's negligence, the Fifth and Ninth Circuits hold that the *Tan Hi* doctrine does not provide a safe harbor for the carrier. *See F.J. Walker Ltd. v. M/V Lemoncore*, 561 F.2d

1138 (5th Cir. 1977) (*Tan Hi* doctrine did not shield carrier from liability, despite surrender of cargo to foreign port authority, because carrier could have exercised sufficient control over the discharge of cargo to prevent damage); *Allstate Ins. Co. v. Imparca Lines*, 646 F.2d 166 (5th Cir. 1981) (*Tan Hi* doctrine applies where carrier was required to surrender the unloading of the vessel to the government organization solely responsible for such port activities, the carrier had nothing further to do with the cargo, and the carrier was powerless to interfere with the exclusive operation of the port by the government organization); *Isthmian Steamship Co. v. California Spray-Chemical Corp.*, 300 F.2d 41, 46 (9th Cir. 1962) (where the negligence which causes the loss occurs before the carrier makes proper delivery, the carrier is liable for the loss). *See generally* Judith Meyer, *In Another Country: The Effect Of Mandatory Port Law Upon Statutory Duties Of Discharge And Delivery -- Tapco Nigeria v. M/V Westwind*, 9 Mar. Law. 123 (1984); *see also Farrell Lines, Inc. v. Highlands Ins. Co.*, 696 F.2d 28 (2d. Cir. 1982) (Second Circuit holds that carrier is not liable for loss of cargo caused after carrier relinquishes control to local port authority pursuant to custom and regulations of foreign port).

It is important that the conflict between the courts of appeals be resolved. The very purpose of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §§ 1300-1315, was to establish uniformity in the rights and liabilities of carriers and shippers in international trade. *See Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 301 (1959); *Pan-Am Trade & Credit Corp. v. The Campfire*, 156 F.2d 603, 606 (2d Cir.), cert. denied 329 U.S. 774 (1946).[3] Without a uniform rule, shippers, carriers, and their bankers cannot know their rights, and underwriters cannot calculate their risks. *See* Judith Meyer, *In*

---

[3]The other federal maritime statute governing international trade, the Harter Act, 46 U.S.C. 190, *et seq.*, imposes the same duty of proper delivery as does COGSA. *See Schoenbaum*, § 10-17; 46 U.S.C. §§ 190, 1303(2).

Another Country: The Effect Of Mandatory Port Law Upon Statutory Duties Of Discharge And Delivery -- Tapco Nigeria v. M/V Westwind, 9 Mar. Law. 123, 125 (1984). Congress passed COGSA and the Harter Act to establish uniformity; the conflict between the Circuit Courts of Appeals has now destroyed uniformity.

Shippers and carriers need a uniform interpretation of the law in order to allocate the risk of loss between them. Only this Court can provide it.

II. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

"The Harter Act requires a proper delivery of the goods by the carrier, and, if COGSA is applicable, the duty of proper delivery is the same." *Schoenbaum*, § 10-17; *see* 46 U.S.C. §§ 190, 1303(2). "'Delivery' is a crucial concept for several reasons. [One of those reasons is that] improper delivery breaches a fundamental duty of the carrier for which there is liability." *Schoenbaum*, § 10-17 n. 1.

Despite the crucial importance of the concepts of delivery and proper delivery, "[t]here is no statutory definition, no legislative history, little case law, and no Supreme Court ... authority directly on point." *Atlantic Mutual Ins. Cos. v. M/V "Balsa 38,"* 695 F. Supp. 165, 167 (S.D.N.Y. 1988); *see also Sumitomo Corp. of America v. M/V Pennsylvania Rainbow*, 1989 AMC 1467 (N.D. Cal. 1989); *Schoenbaum*, § 10-17 n. 1.

The decision of the court of appeals in the case at bar creates a pressing need for this Court to settle the meaning of "proper delivery." To the extent that compelled relinquishment to port authorities exonerates carriers from the carriers' own negligence, carriers have less incentive to give ordinary care to their cargoes. To the same extent, shippers are more at risk for losses and damage caused by the negligence of their carriers.

The exportation of goods from the United States to foreign ports in 1995 (the last year for which statistics are available) totaled $575,900,000,000. *See* U.S. Department of Commerce, *U.S. Foreign Trade Highlights 1995* at 11 (Aug. 1996). Given the enormous annual volume of exports from the United States to foreign ports, it is vital that this Court settle the meaning of the federal statutory rule for allocating risk between carriers and shippers.

CONCLUSION

For the reasons stated, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

Richard T. Thomson
Counsel of Record
Lapp, Laurie, Libra,
Abramson and Thomson,
Chartered
One Financial Plaza
Suite 1800
120 South 6th Street
Minneapolis, MN 55402
(612) 338-5815

Stanton T. Rosen
310 Parkdale Plaza
1660 South Highway 100
St. Louis Park, MN 55416
(612) 417-0660

Attorneys for Petitioner
Gamma-10 Plastics, Inc.

GAMMA 10 PLASTICS, INC., Appellant,

v.

AMERICAN PRESIDENT LINES, LTD.;
American President Companies, Ltd.,
Appellees.

No. 95-3315.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 25, 1996.

Filed Jan. 22, 1997.

Shipper of cargo of plastic resin which became contaminated after "devanning," or removal from its containers prior to its delivery to consignees, brought negligence and breach of contract suit in state court against ocean carrier. After removal, the United States District Court for the District of Minnesota, Robert G. Renner, J., 839 F.Supp. 1359, granted partial summary judgment in favor of shipper on carrier's affirmative defense of limitations, and judgment on jury verdict for shipper for $500,000. Shipper appealed trial court's refusal to allow claim for punitive damages, and carrier cross-appealed partial summary judgment in favor of shipper. The Court of Appeals, 32 F.3d 1244, affirmed in part, and reversed and remanded in part. On remand, the District Court conducted second trial in which jury returned special verdict in favor of carrier, and shipper appealed denial of its motion for new trial. The Court of Appeals, Wollman, Circuit Judge, held that jury instructions were not erroneous on ground that they precluded jury from finding carrier liable on shipper's theory that

carrier devanned cargo before its arrival in port, resulting in its contamination, as several instructions, including "proper delivery" instruction, required jury to make a determination of when and in whose hands the devanning occurred.

Affirmed.

Kay Nord Hunt, argued, Minneapolis, MN, for appellant.

Michael A. Snyder, argued, Chicago, IL (Shanshan Zhou, Chicago, IL, Richard G. Morgan, Lisa A. Easterling, Minneapolis, MN, on the brief), for appellees.

Before WOLLMAN, ROSS, and MURPHY, Circuit Judges.

WOLLMAN, Circuit Judge.

Gamma 10 Plastics, Inc., (Gamma 10) appeals the district court's[1] denial of its motion for a new trial, contending that the district court rendered erroneous jury instructions. We affirm.

I.

In 1988 Gamma 10 entered into a contract with American President Lines, Ltd., (APL) a large steamship carrier. APL was to transport four separate shipments of

---

[1] The Honorable Robert G. Renner, United States District Judge for the District of Minnesota.

Gamma 10's plastic resin from the United States to various ports in China.[2] Upon receipt of the resin from Gamma 10, APL was to issue "through" bills of lading, meaning that APL would be responsible for the goods until they were received by the consignees in China.

Prior to shipping, the plastic resin was packed in bags, placed on wooden pallets, and covered with shrink-wrap plastic. The wrapped resin was then placed in sealed containers for shipment. The contract provided that these containers were to remain sealed until receipt by the consignee.

The consignees for the first two shipments notified Gamma 10 that they were having trouble locating the goods at the designated ports in China. Because of the problems in locating the first two shipments, Gamma 10 instructed APL to hold the third and fourth shipments in the United States. The third shipment, however, was mistakenly sent to China. When the first two shipments were located, the goods had been "devanned" – removed from their containers – and as a result, the resin was contaminated. Gamma 10 claimed that due to APL's alleged devanning of the first two shipments and its failure to make timely delivery of the goods, Gamma 10 lost buyers for the resin, but was eventually able to resell all four shipments at a lower price.

---

[2] The first shipment of five containers was shipped to Whampoa, China; the second shipment of five containers was shipped to Shanghai, China; the third shipment of six containers was shipped to Hong Kong; and the fourth shipment of four containers was held in Los Angeles.

In July of 1990, Gamma 10 filed suit in Minnesota state court. It alleged negligent or intentional misrepresentation and that APL was negligent in shipping, handling, storing, tracking, and protecting Gamma 10's goods, which Gamma 10 claimed was also in breach of their contract. APL removed the case to federal district court. The district court granted partial summary judgment to Gamma 10 on APL's affirmative defense of limitations. After a five-week trial, the jury returned a verdict in favor of Gamma 10 for $500,000. *Gamma-10 Plastics, Inc. v. American President Lines, Ltd.*, 839 F.Supp. 1359 (D.Minn.1993).

Gamma 10 appealed the trial court's refusal to allow it to amend its pleadings to claim punitive damages and refusal to instruct on punitive damages. APL cross-appealed the district court's partial summary judgment in favor of Gamma 10. We affirmed the district court's ruling that claims on the second, third, and fourth shipments were not time barred. *Gamma-10 Plastics, Inc. v. American President Lines, Ltd.*, 32 F.3d 1244 (8th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1270, 131 L.Ed.2d 148 (1995). However, we reversed as to the first shipment to Whampoa, China, finding that the dispute arising over that shipment was time-barred.[3] We also reversed the district court's holding that Gamma 10 could not amend its pleadings to include a claim for punitive damages and remanded for a new trial.

---

[3] Because we held in the first appeal that the claim on the first shipment to Whampoa was time-barred, that shipment was not at issue in the second trial, nor is it in this appeal.

A second trial commenced on April 10, 1995. The jury returned a special verdict on June 7, 1995, in which it found for APL. Gamma 10 moved for a new trial, alleging that the verdict was against the weight of the evidence and that there were erroneous evidentiary rulings and erroneous jury instructions.

II.

Gamma 10 appeals the denial of its motion for a new trial only on the ground that the district court's jury instructions regarding "proper delivery" were erroneous.[4] Gamma 10 advanced three theories of how the containers were devanned. One theory was that the Chinese port authority devanned the containers; a second theory was that APL devanned the containers once the shipment reached Shanghai; a third theory was that APL devanned the cargo prior to its arrival in Shanghai. Gamma 10 argues that the instructions precluded the jury from finding APL liable on this third alternative.

Gamma 10 contends that in order for the jury to be able to find liability based on the third theory, the word "containerized" (as indicated in brackets) should have been included in Instruction No. 21:

> The bills of lading in this case were through bills requiring delivery to a party in possession of an original bill of lading, the consignee. Therefore, in this case the duty of proper delivery required

---

[4] APL contends that Gamma 10 waived this argument, and that in any event it is precluded by the "law of the case" doctrine. In light of our disposition, we need not address these arguments.

> American President Lines either to deliver the [containerized] cargo to the consignee or to deliver it to a fit wharf and to take reasonable steps to safeguard it until the shipper or the consignee had a reasonable opportunity to claim the cargo. But if you find that APL proved by the greater weight of the evidence that (1) the Chinese port practices, customs, regulations, or laws required American President Lines to relinquish the cargo to a port authority; (2) APL in fact delivered Gamma 10's [containerized] goods into the custody of the port authority; (3) APL acted at all times in compliance with the port law and port regulations of the foreign port; and (4) the loss or damage was accomplished while the goods were in the custody of foreign port authority officials, then American President Lines is not liable for any damage or loss that occurred after the port authority took possession.

Gamma 10 makes the same argument with regard to Instruction No. 21a:

> I instruct you that proper delivery was also made if you find that (1) Sinotrans and PENAVICO are government-controlled agencies acting in an official capacity and outside of the agency or control of APL; (2) APL was required by law or port practices to relinquish the cargo to either agency; (3) APL delivered the [containerized] cargo into the custody and control of either agency; (4) APL and its agents acted at all times in compliance with port law and port regulations of the foreign port; and (5) the loss or damage was accomplished while the goods were in the custody of either Sinotrans or PENAVICO.

Gamma 10 argues that to absolve APL from liability, the jury had to find not only that the goods reached the Chinese ports, but also that they were in their containers when delivered. Gamma 10 contends that the instruction as given, without the word "containerized" did not permit the jury to find APL liable as long as the goods were ultimately delivered, in whatever state.

III.

In determining whether a jury instruction is proper, we keep in mind that the district court has " 'wide discretion' " in drafting jury instructions. *Hose v. Chicago Northwestern Transp. Co.*, 70 F.3d 968, 977 (8th Cir.1995) (quoting *Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 906 F.2d 1206, 1212 (8th Cir.1990)) (citation omitted). We must read the jury instructions as a whole and look at the instruction at issue in light of the entire charge. *National Automotive Trading Corp. v. Pioneer Trading Co.*, 46 F.3d 842, 844 (8th Cir.1995) (per curiam). Our review of jury instructions is confined to whether the instructions "fairly and adequately present the issues in the case to the jury." *Hose*, 70 F.3d at 977. As long as " 'the instructions, considered as a whole, adequately and sufficiently state the generally applicable law, the fact that the instructions are technically imperfect or are not a model of clarity does not render the charge erroneous.' " *National Automotive*, 46 F.3d at 844 (quoting *Tribble v. Westinghouse Elec. Corp.*, 669 F.2d 1193, 1197 (8th Cir.), *cert. denied*, 460 U.S. 1080, 103 S.Ct. 1767, 76 L.Ed.2d 342 (1983)).

We conclude that when read in their entirety, the instructions were not erroneous. They did not preclude the jury from finding APL liable on Gamma 10's theory that APL devanned the goods before their arrival in Shanghai, but rather required the jury to consider that possibility.

Instruction No. 21 required the jury to find all four of the elements of proper delivery in order to absolve APL from liability. The proper delivery instruction is written in the conjunctive, plainly stating that only if the jury found all four elements, could it find for APL. The fourth element in the proper delivery instruction required the jury to find that "the loss or damage was accomplished while the goods were in the custody of foreign port authority officials." Thus, this part of the instruction required that the jury make a determination of when and in whose hands the devanning occurred.

Likewise, Instruction No. 21a required the jury to find that all five listed circumstances set forth therein existed before absolving APL of liability, which included a finding that "the loss or damage was accomplished while the goods were in the custody of either Sinotrans or PENAVICO." Thus, this instruction also required the jury to consider the circumstances surrounding the devanning of the cargo.

In addition, the jury was aware of Gamma 10's allegations: first, that APL devanned the containers prior to delivery to the Chinese port; second, that the devanning of the containers caused the resin to become contaminated; and third, that it was the contamination which

ultimately resulted in Gamma 10's loss or damage. Therefore, if the jury had believed Gamma 10's allegation that APL devanned the goods prior to arrival at the port, the jury would also have had to conclude that such devanning and the consequent loss or damage occurred when the goods were in the hands of APL. Thus, by making the finding that the loss or damage occurred in the hands of another party and ultimately concluding that APL was not liable, the jury necessarily considered that which Gamma 10 now contends the jury was not given the opportunity to consider – whether APL devanned the goods prior to their arrival at the Chinese port.

The proper delivery instruction, above, also plainly stated that the duty of proper delivery also required APL to "take reasonable steps to safeguard [the cargo] until the shipper or the consignee had a reasonable opportunity to claim the cargo." The court later instructed the jury that one of Gamma 10's theories of negligence was that APL had failed to safeguard by emptying the cargo. Thus, the jury was made aware that devanning the cargo would constitute a failure to safeguard the cargo. Such a failure would constitute improper delivery, which in turn would require the jury to find APL liable on Gamma 10's claim that APL devanned the containers prior to delivery.

Gamma 10 also contends that the trial court merely listed Gamma 10's allegations of negligence without instructing the jury as to how the allegations would lead to a finding of liability. Gamma 10's contention that the court provided no link to liability is unfounded. The court supplemented these allegations by instructing the jury that Gamma 10 would prove the essential elements of its claim if it showed that APL was "negligent in one or

more of the particulars alleged in instruction 22," and that negligence was the "proximate cause of the injury and consequent damage sustained by Gamma 10." Moreover, the jury was asked on the special verdict form whether it found "that the defendants or their agents acted negligently in performing any one or more of the specific acts of negligence alleged by Gamma 10." Instruction No. 22 informed the jury that:

> . . . .
>
> 2. American President lines or its agents failed to take reasonable steps to safeguard Gamma 10's cargo between September and December of 1988 by emptying the cargo from the sealed containers;
>
> . . . .
>
> 4. American President Lines or its agents violated port law, port practices, and port regulations in China by devanning, or emptying, Gamma 10's goods prior to the arrival of a consignee[.]

Taken as a whole, these instructions clearly provided an avenue for the jury to find negligence based on Gamma 10's allegation that APL devanned the goods prior to their arrival in Shanghai.

Similarly, with regard to the breach of contract claim, the jury was informed of Gamma 10's allegations that APL had breached the contract by failing to properly deliver and safeguard, by devanning the containers prior to the consignees' taking possession, and by breaking the seals on the containers. Thus, the jury was fully apprised of Gamma 10's theory regarding breach of contract and

was bound to find APL in breach of its contract if it concluded that Gamma 10's allegations were true.

The judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3315MNST

Gamma 10 Plastics, Inc., Appellant,	*	Appeal from the United States District Court for the District of Minnesota
v.	*	
American President Lines, Ltd., et al, Appellees.	*	

The petition for rehearing filed by the appellant has been considered by the court and is denied.

March 10, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

GAMMA 10 PLASTICS, INC.,

Plaintiff,

v.

AMERICAN PRESIDENT LINES, LTD. and AMERICAN PRESIDENT COMPANIES, LTD.,

Defendants.

ORDER

(Filed Aug. 14, 1995)

Civil No. 3-90-428

The above-entitled action came on for trial before the undersigned and a jury between April 10 and June 5, 1995. On June 7, 1995, the jury returned a verdict for the defendant American President Lines ("APL"). Presently before the court is Plaintiff Gamma 10 Plastics, Inc.'s ("Gamma 10") motion for a new trial.

Gamma 10 claims that a new trial is warranted on the following grounds: 1) the verdict was against the clear weight of the evidence and based upon false evidence; 2) erroneous evidentiary rulings; and 3) prejudicial errors in jury instructions.

Federal Rule of Civil Procedure 59 governs a motion for a new trial. A new trial is appropriate to prevent the verdict from working a substantial injustice, such as where the verdict conflicts with the great weight of the evidence or the record reflects prejudicial error. *Fireman's*

Fund Ins. Co. v. Aalco Wrecking Co., Inc., 466 F.2d 179, 186 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973).

In granting a new trial on the ground that the verdict is against the weight of the evidence, "[t]he court must be motivated by more than the fact that it would have come to a different conclusion had it been the trier of fact. The court must feel that the jury reached a seriously erroneous result in spite of the clear weight of the evidence." *Leichihman v. Pickwick, Int'l*, 814 F.2d 1263, 1266 (8th Cir.), *cert. denied*, 484 U.S. 855 (1987). A Rule 59 motion may also be granted where the evidentiary rulings were so prejudicial as to require a new trial which likely would produce a different result. *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1200 (8th Cir. 1990).

As to the sufficiency of the evidence, the Court finds that the jury verdict was supported by the clear weight of the evidence and did not result in an injustice. Further, the jury was sufficiently instructed to consider the witnesses' interests, financial or otherwise, when judging their credibility. The determination of the truth or falsity of the evidence was properly left to the jury.

With respect to the alleged evidentiary errors, the evidentiary issues were fully briefed and argued at trial and carefully considered by the Court at that time. The arguments made in connection with the instant motion do not show the Court's earlier rulings to be in error. Accordingly, the identified evidentiary rulings do not warrant a new trial in this matter.

Plaintiff also lists several jury instructions which it claims constituted prejudicial error. Upon review for error, jury instructions must be considered in their

entirety. *Toro Co. v. R & R Products Co.*, 787 F.2d 1208, 1215 (8th Cir. 1986). The instructions as a whole must state the law fairly and accurately as applied to the evidence presented; "a lack of absolute clarity will not render the instructions erroneous." *Id.*

Of Plaintiff's identified errors in the instructions, only one merits discussion here. Instruction 21 and 21a ("a" representing the second page of instruction 21) incorporates the *Tan Hi* doctrine. *Tan Hi* relieves a carrier of its duty of proper delivery under the Harter Act of foreign law requires the carrier to surrender control of the cargo to the foreign authority. *See Tapco Nigeria, Ltd. v. M/V Westwind*, 702 F.2d 1252, 1257 (5th Cir. 1983).

To the extent Plaintiff raises objections to this instruction which it failed to raise during trial, they are waived. Instruction 21, in all essential respects, is identical to the *Tan Hi* instruction given in the first trial and upheld on appeal. As the evidence at the second trial again supported the instruction, the Court properly included it.

Further, Instruction 21 represents a fair and accurate statement of the law of proper delivery. All of Plaintiff's sound and fury over the absence of the word "containerized" signifies nothing. Plaintiff argues that the insertion of "containerized" prior to "cargo" in the second paragraph was essential to its theory of liability. Plaintiff argued to the jury that APL devanned the cargo in Hong Kong, before reaching the proper destination of shanghai, and that this premature devanning damaged the cargo.

The instruction as given, without the term "containerized," correctly states the law and, paralleling the instruction from the first trial, constitutes the law of the

case. Moreover, the instruction provided Plaintiff adequate room to argue its theory. Under the requirements set forth in Instruction 21, the loss or damage to the cargo had to be accomplished while the goods were in the custody of the port authority officials. If the jury had found that APL prematurely devanned the cargo in Hong Kong, ultimately causing the damage, proper delivery would not have been made and the *exception would not* apply. The absence of the adjective containerized, therefore, did not result in a misstatement of the law and did not prejudice Gamma 10.

Gamma 10 also claims that the inclusion of Instruction 21a was erroneous and prejudicial. Contrary to Plaintiff's assertions, the first paragraph of page 21a did not constitute a separate, "double dose" of the *Tan Hi* doctrine, but rather a continuation of Instruction 21 as applied to Sinotrans and Penevico. Substantial evidence was presented at trial regarding Sinotrans and Penevico, including testimony to the effect that the entities were government-controlled agencies, warranting an addition to the original instruction.

Gamma 10's primary complaint with respect to Instruction 21a is that the *Tan Hi* exception should not apply to Senotrans or Penevico because they were agents of APL and thus APL did not lose control over the goods as required under the doctrine. The instruction as given, however, presumed or inferred neither that Sinotrans and Penevico were government-controlled, nor that they acted outside of the agency of APL. Rather, the instruction specifically required the jury to make those findings. For the *Tan Hi* doctrine to apply, the jury had to find the following: 1) Sinotrans and Penevico are government-

controlled agencies; 2) they acted in an official capacity; 3) they acted outside of the agency *or control* of APL; 4) APL was required by law or port practices to relinquish the cargo to either agency; 5) APL in fact delivered the cargo into the custody *and control* of either agency; 6) APL *and its agents* acted at all times in compliance with port law and port regulations; and 7) the loss or damage was accomplished while the goods were in the custody of either Sinotrans or Penevico.

The question of the agency relationship was properly left within the province of the jury. If the jury had found that Sinotrans and Penevico acted as agents or under the control of APL as Gamma 10 argued, the exception would not apply. The instruction as a whole fairly and accurately stated the law and thus does not warrant a new trial. The Court similarly finds Plaintiff's objections to the other instructions without merit.

Therefore, based upon all files, records and proceedings herein, Plaintiff's motion for a new trial (Doc. No. 386) is **DENIED.**

Dated: August 14, 1995.

/s/ Robert G. Renner
ROBERT G. RENNER,
Senior Judge
United States
District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Gamma 10 Plastics, Inc.

v.

American President Lines, Ltd. and American President Companies, Ltd.

Case No. Civil 3-90-428

JUDGMENT IN A CIVIL CASE

(X) **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

( ) **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits, and the defendants recover of the plaintiff their costs of action.

DATE: June 8, 1995

FRANCIS E. DOSAL,
CLERK

/s/ Robert G. Renner
Robert G. Renner,
Senior Judge

/s/ Denise La Fond
Denise La Fond,
Deputy Clerk

Jury Instruction No. 21:

A carrier such as American President Lines owes to a Shipper such as Gamma-10 the duty to exercise reasonable care to protect the shipper's cargo while the cargo is in its or its agents' possession. A carrier also owes a shipper the duty to "properly deliver" the cargo.

The bills of lading in this case were "through bills" requiring delivery to a party in possession of an original bill of lading (the consignee). Therefore, in this case the duty of proper delivery required American President Lines either to deliver the cargo to the consignee or to deliver it to a fit wharf and to take reasonable steps to safeguard it until the shipper or the consignee had a reasonable opportunity to claim the cargo. But if you find that APL proved by the greater weight of the evidence that (1) the Chinese port practices, customs, regulations, or laws required American President Lines to relinquish the cargo to a port authority; (2) APL in fact delivered Gamma-10's goods into the custody of the port authority; (3) APL acted at all times in compliance with the port law and port regulations of the foreign port; and (4) the loss or damage was accomplished while the goods were in the custody of foreign port authority officials, then American President Lines is not liable for any damage or loss that occurred after the port authority took possession.

Jury Instruction No. 21(a):

I instruct you that proper delivery was also made if you find that (1) Sinotrans and Penevico are government-controlled agencies acting in an official capacity and outside of the agency control of APL; (2) APL was required by law or port practices to relinquish the cargo to either agency; (3) APL delivered the cargo into the custody and control of either agency; (4) APL and its agents acted at all times in compliance with port law and port regulations of the foreign port; and (5) the loss or damage was accomplished while the goods were in the custody of either Sinotrans or Penevico.

Because American President Lines selected the feeder vessel companies that transported Gamma-10's cargo from Hong Kong to Shanghai and Whampoa, these feeder companies were agents of American president Lines at that time. Therefore, American President Lines is responsible for the acts of the feeder vessel companies. You are also to consider that the terminal operators who received the goods in China acted as agents of American President Lines, and their conduct is chargeable to American President Lines unless you find from the greater weight of the evidence that the terminal operator served as the port authority for China in an official capacity.

Jury Instruction No. 22:

Gamma-10 alleges that American President Lines' conduct was negligent in the following particulars:

1. American President Lines or its agents failed to properly deliver Gamma-10's goods in accordance with the terms of the applicable tariffs and bills of lading;

2. American President Lines or its agents failed to take reasonable steps to safeguard Gamma-10's inquiries about the location of its cargo in Shanghai, China between September and December 1988.

3. American President Lines or its agents failed to adequately respond to Gamma-10's inquiries about the location of its cargo in Shanghai, China between September and December 1988.

4. American President Lines or its agents violated port law, port practices, and port regulations in China by devanning, or emptying, Gamma-10's goods prior to the arrival of a consignee; and

5. American President Lines improperly refused to release a portion of the Shanghai cargo unless Gamma-10 paid other bills of lading in China.

Gamma-10 must establish one or more of these particulars by the greater weight of the evidence.

Jury Instruction No. 27:

In order to prove the essential elements of its claim, the burden is on Gamma-10 to establish, by the greater weight of the evidence in the case, the following facts:

FIRST, that American President Lines or its agents were negligent in one or more of the particulars alleged in instruction 22; and

SECOND, that the negligence of American President Lines or its agents was a proximate cause of the injury and consequent damage sustained by Gamma-10.